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SUPREME COURT, U.S.
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CASE NO.

# In the Supreme Court of the United States

October Term, 1985

HERLINDO RUBIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

JAMES C. BLECKE
*Counsel of Record*
SUSAN S. LERNER
*Attorneys for Petitioner*
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

## QUESTION PRESENTED FOR REVIEW

Petitioner was eastbound on Interstate 10 between El Paso and San Antonio, Texas, when he was stopped by the Border Patrol at a fixed checkpoint. After producing valid resident alien identification, he was ordered to a secondary detention area where a full search of his trunk and enclosed luggage was conducted. No contraband was found. $127,700 was confiscated and subjected to civil forfeiture.

The district court found that the search was conducted "without probable cause," without any suggestion of the "possibility of the existence of contraband," and without a "hint at the possibility of illegal activity." These district court findings went undisturbed at the circuit court level.

The question presented for review is whether the search offends Fourth Amendment protection from unreasonable search and seizure. The district court held that it did. The circuit court reversed, holding such non-probable cause searches are within the powers of the Border Patrol as a "functional equivalent" of a border search.

Subsumed within the broad question presented for review are the questions of the permissible scope of a Border Patrol search at a fixed checkpoint, the definition and scope of "functional equivalency" of a border search, and the breadth of search authority under 8 U.S.C. §1357 and 19 U.S.C. §482.

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HERLINDO RUBIO,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Herlindo Rubio, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered December 23, 1985.

## OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, not reported, is reproduced in the appendix ("A") at pages 16-23. The memorandum opinion and judgment of the United States District Court for the Western District of Texas, Pecos Division, not reported, is reproduced in the appendix at pages 1-15.

## JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered December 23, 1985, and this petition for writ of certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV. Searches and seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8 U.S.C. §1357. Powers of immigration officers and employees - Powers without warrant:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant -
>
> (1) ...
>
> (2) ...
>
> (3) Within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, ...
>
> (4) ...

19 U.S.C. §482. Search of vehicles and persons

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vechicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; ...

## STATEMENT OF THE CASE

Herlindo Rubio, a resident alien, was stopped by United States Border Patrol agents at the Sierra Blanca Border Patrol checkpoint, located on Interstate 10, eighty miles east of El Paso, Texas (A. 18). Rubio was instructed to pull off the road into a secondary inspection area

where a Border Patrol agent ordered Rubio to open the trunk of his car (A. 18). The Border Patrol agent, without probable cause, searched a suitcase, a tool box, and a small portable electric refrigerator, all located inside the trunk (A. 18-19). The search uncovered a scale containing traces of cocaine and $127,700 in United States currency (A. 19).

After seizing the currency, the Government filed a complaint for civil forfeiture of the currency discovered in Rubio's car, pursuant to 21 U.S.C. §881(a)(6). Rubio asserted that the search was conducted in violation of the Fourth Amendment, thus requiring the Government to return the seized currency (A. 19).

The district court entered detailed findings of fact. When questioned about his citizenship at the primary inspection point, Rubio stated that he was a Cuban

and immediately produced a legal resident alien card and valid driver's license establishing his legal status within the United States (A. 2). Rubio was then instructed to park his vehicle at the secondary inspection station where he again produced his legal resident alien card and valid driver's license (A. 3).

The Border Patrol agent then ordered Rubio to open the trunk of his vehicle. Once inside the trunk, he found a small suitcase which he opened and searched. Inside the suitcase, he found a locked commercial bank bag which he searched and found approximately $25,000 in United States currency (A. 3). Additionally, the agent found a combination locked metal tool box, which he ordered Rubio to open. Upon being informed by Rubio that he did not know the combination, the agent broke the lock, searched the box and found additional United States cur-

rency (A. 3-4). Continuing his search, the agent found and opened a small portable refrigerator, finding another commercial bank bag containing more currency (A. 4). Also produced in the search of the trunk was a small vinyl case which was opened and found to contain a scale with white residue (A. 4). The district court found:

> 6. There was no contraband found within the passenger compartment of the vehicle, nor was there found anything therein which might suggest the possibility of the existence of contraband. Likewise, a visual inspection of the interior of the vehicle's trunk suggested nothing which might hint at the possibility of illegal activity. (A. 4-5)

The district court found that the entire search of the interior and trunk of the vehicle was based "solely" upon perceived nervousness of Rubio (A. 4). The Border Patrol agent testified that the "mission" of the United States Border

Patrol at the Sierra Blanca checkpoint was to "apprehend illegals" (A. 5). The district court found that it was immediately apparent to the Border Patrol that no illegal aliens were contained within Rubio's vehicle (A. 5). A Border Patrol agent testified that perhaps a "small alien" could have been hiding in some of the containers. The district court disregarded this testimony as absurd (A. 10).

The district court held that the initial stop of Rubio's vehicle at the Sierra Blanca permanent checkpoint was a valid stop (A. 9). The district court held further that the visual inspection of the trunk was valid (A. 9). The district court also held, however, that in the absence of probable cause the search of Rubio's vehicle was limited in scope to areas in which an illegal alien

could reasonably be believed to be concealed (A. 9).

Because the Border Patrol agent exceeded the scope of a search necessary to effectuate his purpose, the district court found a violation of Rubio's Fourth Amendment rights and that the exclusionary rule of the Fourth Amendment applied in this civil forfeiture proceeding. Probable cause for the forfeiture could not rest upon the tainted evidence (A. 8).

Based upon these findings and conclusions, the District Court entered judgment in favor of Rubio and ordered the Government to return the $127,700 in seized currency to Rubio (A. 14). The Government appealed to the Fifth Circuit and the Fifth Circuit reversed, holding that nonprobable cause searches for contraband are permissible at the Sierra Blanca Border Patrol permanent checkpoint

located on Interstate 10 east of El Paso as the functional equivalent of a border search (A. 20-23). Rubio petitions this Court for certiorari review of this unwarranted erosion of the Fourth Amendment freedom from unreasonable search and seizure otherwise afforded domestic travel.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE PERMISSIBLE SCOPE OF WARRANTLESS SEARCHES AT PERMANENT BORDER PATROL CHECKPOINTS AND WARRANTLESS SEARCHES UNDER 8 U.S.C. §1357(a)(3).

In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), this Court held that vehicular traffic crossing international borders is subject to search for national self protection. One entering the country must identify himself as entitled to come in and must identify his belongings as effects which may be lawfully brought in.

> But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. (267 U.S. at 154, 45 S.Ct. at 285).

In Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), this Court held that a warrantless search without probable cause by Border Patrol agents on a roving patrol violated the Fourth Amendment prohibition against unreasonable search and seizure. The search occurred on a California road that paralleled the Mexican border. Although the highway was a common route for illegal aliens to travel, perfectly innocent drivers were being stopped on the road without any probable cause and subjected to a search of their automobiles. 413 U.S. at 273, 93 S.Ct. at 2539 n.5.

> One who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite. (413 U.S. at 281, 93 S.Ct. at 2543, Justice Powell concurring).

Justice White joined by the Chief Justice, Justice Blackmun, and Justice Rehnquist dissented, in the belief that 8 U.S.C. §1357(a)(3) authorized Border Patrol officers without warrant, to search any vehicle for aliens within a reasonable distance from any external boundary of the United States and therefore validated the search of Almeida-Sanchez's vehicle. 413 U.S. at 291, 93 S.Ct. at 2548. The dissent notes, however:

> No searches of the person or for contraband are authorized by the section. The authority extended by the statute is limited to that reasonably necessary for the officer to assure himself that the vehicle or other conveyance is not carrying an alien who is illegally within this country and more extensive searches of automobiles without probable cause are not permitted by the section. (413 U.S. at 294, 93 S.Ct. at 2550).

In United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975), this Court distinguished the per-

missible non-probable cause stop of a vehicle at a fixed Border Patrol checkpoint from the impermissible non-probable cause search of a vehicle at a fixed Border Patrol checkpoint. This Court recognized that unfettered discretion to select cars for search at a fixed Border Patrol checkpoint "is not consistent with the Fourth Amendment." 422 U.S. at 896, 95 S.Ct. at 2588. A search of an automobile remains a substantial invasion of privacy.

> To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search. (Id.).

Justice Rehnquist in his concurrence stressed that the opinion was confined to "full searches" and did not extend to fixed checkpoint stops for the purpose of inquiring about citizenship. 422 U.S. at 898, 95 S.Ct. at 2589.

In United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), this Court again recognized the three kinds of Border Patrol inland operations; permanent checkpoints, temporary checkpoints, and roving patrols. 428 U.S. at 552, 96 S.Ct. at 3080. Weighing the public interests against Fourth Amendment interests this Court determined that routine permanent checkpoint stops represent a limited intrusion on a motorist's right to free passage without interruption and, as such, are reasonable by Fourth Amendment standards. Critical to this determination was the limited scope of such routine stops.

> Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. (428 U.S. at 558, 96 S.Ct. at 3083).

This Court also held constitutional the selected referral of motorists to the secondary inspection areas at the permanent Border Patrol checkpoints. 428 U.S. at 563, 96 S.Ct. at 3085.

After reaching these conclusions, this Court closed its opinion with the following admonition:

> [C]heckpoint searches are constitutional only if justified by consent or probable cause to search. United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975). And our holding today is limited to the type of stops described in this opinion. '[A]ny further detention ... must be based on consent or probable cause.' (428 U.S. at 567, 96 S.Ct. at 3087).

In holding that the Border Patrol is entitled to make non-probable cause searches for contraband at the Sierra Blanca permanent checkpoint on Interstate 10, the Fifth Circuit has eviscerated the probable cause requirement consistently applied by this Court to all fixed check-

point Border Patrol searches. This court should grant the petition and maintain this consistency in the interpretation of Fourth Amendment safeguards.

## II.

## THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE PERMISSIBLE SCOPE OF WARRANTLESS SEARCHES AT PERMANENT BORDER PATROL CHECKPOINTS AND WARRANTLESS SEARCHES UNDER 8 U.S.C. §1357(a)(3).

The Court of Appeals for the Ninth Circuit has held that under 8 U.S.C. §1357(a)(3) automobiles may be stopped at fixed checkpoints without warrant or probable cause and a limited search for aliens may be carried out in those portions of the vehicle capable of concealing any illegal aliens. But further search for contraband, without probable cause, violates the Fourth Amendment freedom from unreasonable search. Fumagalli v. United States, 429 F.2d 1011 (9th Cir.

1970). See, also, Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961).

In Fumagalli, the Ninth Circuit reviewed and approved a non-probable cause stop of a vehicle at a fixed Border Patrol checkpoint and the probable cause search predicated upon the smell of marihuana and the appearance of a brick of marihuana upon the opening of the trunk. Authorization for the search of the trunk was predicated upon 8 U.S.C. §1357, a warrantless search for illegal aliens.

> [P]robable cause is not required for an immigration search within approved limits but is generally required to sustain the legality of a search for contraband in a person's automobile conducted away from the international borders. (429 F.2d at 1011).

See, also, United States v. Corral-Villa Vicencio, 753 F.2d 785 (9th Cir. 1985) and United States v. Perez, 644

F.2d 1299 (9th Cir. 1981), for Ninth Circuit analyses of "extended border searches." Compare, United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982).

The Court of Appeals for the Tenth Circuit is of similar persuasion. In Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969), the court interpreted 8 U.S.C. §1357(a)(3) as authorizing an initial stop and search for aliens without probable cause. The authority of the Border Patrol officers was, however, restricted to a search for aliens.

> The immigration inspectors were justified in stopping the car but not in conducting a general search for law violations. (410 F.2d at 1209).

In United States v. Rengifo-Castro, 620 F.2d 230 (10th Cir. 1980), the Tenth Circuit found a Fourth Amendment violation in the non-probable cause search of luggage by Border Patrol agents at a

fixed checkpoint located on Interstate 10 west of Las Cruces, New Mexico. The Tenth Circuit concluded that the §1357 Border Patrol exception to the warrant requirement applied only to searches of vehicles of aliens and not to the search of closed luggage. 620 F.2d at 232.

> In order to withstand constitutional scrutiny there must have existed probable cause to search plus sufficient exigent circumstances to make the obtaining of a warrant impracticable. (Id.).

The Tenth Circuit concluded that the reasonable expectation of privacy associated with closed luggage applied and that the reasons for not requiring a warrant for the search of an automobile did not apply to searches of luggage.

> Additionally, the reasons for not requiring a warrant for searches at border stops do not apply to searches of luggage taken at fixed checkpoints. (620 F.2d 233).

In deciding whether to accept this case for review, this Court should consider the disparate constitutional treatment rendered travelers eastbound from Los Angeles, California to Jacksonville, Florida via Interstate 10, passing through the Ninth and Tenth Circuits into the Fifth Circuit.

As they proceed through the fixed Border Patrol checkpoint on Interstate 10 west of Las Cruces, New Mexico, they will be afforded Fourth Amendment protection from arbitrary, capricious, and non-probable cause searches of their closed luggage and personal belongings. When they reach the fixed Border Patrol checkpoint located on Interstate 10 east of El Paso, however, no such constitutional protection will be found. Under Fifth Circuit doctrine, the Border Patrol will have the unfettered discretion to search closed luggage and forcibly pry open locked

containers - all without probable cause or reasonable suspicion that any illegal activity has occurred.

As will be discussed in the section that follows, the constitutional protection of the Fourth Amendment is restored when the transcontinental voyager continues along Interstate 10 and enters the Eleventh Circuit. The Eleventh Circuit rejects the Fifth Circuit's mischaracterization of a fixed checkpoint as the "functional equivalent of a border" and protects the domestic traveler from unreasonable search when passing through fixed Border Patrol checkpoints.

## III.

## THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE DEFINITION OF A "FUNCTIONAL EQUIVALENT" OF A BORDER CROSSING.

In United States v. Oyarzun, 760 F.2d 570 (5th Cir. 1985), the Fifth Circuit acknowledged its differences with the Eleventh Circuit's opinion in United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982). There, the Eleventh Circuit severed its stare decisis ties with the old Fifth Circuit and declined to follow the Fifth Circuit's use of "functional equivalent" for permanent Border Patrol checkpoint searches. As the Eleventh Circuit recognized:

> The searches do not fit within the traditional definition of a border search, which refers to searches of persons, conveyances, or objects that have come into the United States from outside. (672 F.2d at 1365).

The Eleventh Circuit refers to checkpoint searches as "checkpoint searches" and not as searches at the "functional equivalent of the border." Id. In the Eleventh Circuit the functional equiva-

lent of a border search is a search that takes place after a border crossing at the first practicable detention point. "Such searches are truly border searches because their sole justification is the fact that the border has been crossed." Id.

In Jasinski v. Adams, 781 F.2d 843 (11th Cir. 1986), the Eleventh Circuit applied its Garcia analysis to a fixed Border Patrol checkpoint comparable to the Sierra Blanca checkpoint under consideration in this case. In Jasinski, the Border Patrol established a fixed checkpoint at Florida City to police the influx of aliens over the actual border, the Florida keys' two hundred miles of shoreline. The checkpoint was established in recognition of the hopeless task of patrolling the entire border. Despite its distance from the shoreline, Florida City provided a strategic advan-

tage. At that point, the Border Patrol could monitor all traffic flowing north from the keys on U.S. 1, just before that road divides into several routes into the interior. Measured against the legal standards of Martinez-Fuerte and Ortiz, the Eleventh Circuit concluded no suspicion was necessary for a stop at the Border Patrol checkpoint, but probable cause was required for a search. 781 F.2d at 847.

The phrase "functional equivalent" finds its genesis in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). There, this Court opined:

> Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads

> that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search. (413 U.S. at 272-3, 93 S.Ct. at 2539).

These comments were immediately followed by the statement that the vehicular search occurring on a road that paralleled the Mexican border "was of a wholly different sort" and in the absence of probable cause violated the Fourth Amendment. 413 U.S. at 273, 93 S.Ct. at 2539-40.

In United States v. Hart, 506 F.2d 887 (5th Cir.), vacated, 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706 (1975), the Fifth Circuit was called upon to interpret the scope of 8 U.S.C. §1357(a)(3) and non-probable cause searches for aliens at the permanent Border Patrol

checkpoint located at Sierra Blanca. The Fifth Circuit recognized the "new aphorism" which had arisen from this Court's opinion in Almeida-Sanchez referable to searches at the "functional equivalent of the border." In Hart, the Fifth Circuit held that functional equivalency was nothing more than the principle of constitutional law embodied in the decisions upholding the validity of searches conducted pursuant to 8 U.S.C. §1357(a)(3) at permanent checkpoints. 506 F.2d at 895.

Of particular significance was the Fifth Circuit's reluctance to consider what kind of "functional equivalent of the border" would permit a true border search, rather than the restricted §1357 search for aliens. The Fifth Circuit opined that the inland airport example used in Almeida-Sanchez would seem to

permit a complete search, not just a search for aliens. 506 F.2d at 895.

> The inland crossroads example, however, might be restricted to a §1357 search with all of the judicial gloss that has been superimposed upon the statute. (Id.).

In Hart, the Fifth Circuit did not purport to decide any more than the case at hand, a §1357 search for aliens at the Sierra Blanca permanent checkpoint. 506 F.2d at 895. Unfortunately, having once labeled the Sierra Blanca permanent checkpoint as a "functional equivalent" for this limited purpose, a series of Fifth Circuit decisions have perverted this limited holding into the broad conclusion that the Sierra Blanca checkpoint, located on Interstate 10 some eighty miles east of El Paso, is the "functional equivalent" of a true border crossing where non-probable cause searches are virtually unrestrained. This perversion

is chronicled in United States v. Oyarzun, supra, and is appropriately criticized in the dissent. See, also, United States v. Alvarez-Gonzalez, 561 F.2d 620, 626-30 (5th Cir. 1977) (Goldberg, J., dissenting).

It is not the locale but the purpose of the search that triggers functional equivalency. The St. Louis airport is not the functional equivalent of the border. If it were, all passengers would be subject to search. It is only the search of the international flight that is the functional equivalent of a border search. Here, there was no border crossing, no suspicion of a border crossing, and no justification for a border search.

Even if the search of Rubio's vehicle in this case is tested by the more liberal "reasonable" rather than "probable" cause to search afforded customs officials at a true border crossing, the

search of Rubio's luggage cannot pass muster. A custom's official must still have "reasonable cause to suspect" an importation contrary to law. 19 U.S.C. §482; United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); United States v. Bilir, 592 F.2d 735 (4th Cir. 1979); United States v. Gallagher, 557 F.2d 1041 (4th Cir.), cert. den., 434 U.S. 870, 98 S.Ct. 213, 54 L.Ed.2d 148 (1977). Compare Fernandez v. United States, 429 F.2d 1011 (9th Cir. 1963) with Contreras v. United States, 291 F.2d 63 (9th Cir. 1961).

Here, the Fifth Circuit jettisons the statutory "reasonable cause" requirement by again taking language out of context from one of its earlier decisions. Here, the Fifth Circuit affords Rubio no Fourth Amendment protection because "Border Patrol agents wear two hats, one as an immigration officer and the other as a

customs officer," relying upon United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), cert. den., 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973).

Here, the Fifth Circuit's McDaniel analysis overlooks its own limitations. In McDaniel, the Fifth Circuit held:

> [I]f the car can reasonably be stopped pursuant to an authorized border search, the agents are empowered to search the car, including its trunk, for aliens. [citations omitted]. But even beyond that, the objective behavior of the car's occupants, as described by the agent, would support the proposition that the agents had 'reasonable suspicion' to search the trunk within the confines of the immigration statutes. (463 F.2d at 133).

The court concluded that the Border Patrol agents did not have authority to search the contents under immigration laws, but they were empowered "under the circumstances" to search under authority of the customs laws. 463 F.2d at 134. Although planning to wear their immigra-

tion hats that night, they were not precluded from later donning their customs hats if justified under the circumstances. Operating on an "expanded border search" theory:

> [T]he agents must have adequate grounds for a 'reasonable suspicion' that the bags contained a substance being transported in violation of the customs laws, 19 U.S.C.A. §482. (Id).

The Fifth Circuit concluded in McDaniel that the circumstances presented "a very reasonable suspicion that contraband was in the bags." Id.

Here it has never been suggested that the Border Patrol agents had any cause to suspect a customs violation. Here, the stop and search was in fulfillment of the Border Patrol's mission to "apprehend illegals." The search of Rubio's suitcase and tool box was, according to the Border Patrol agent, a search for a "small alien." Although demonstrably

absurd, it was nevertheless the patrol's only justification for the search. They never donned their customs hats and never had reasonable cause for a 19 U.S.C. §482 search. Here, the district court found nothing to suggest the possibility of contraband and found "nothing which might hint at the possibility of illegal activity" (A. 5).

At no point does Interstate 10 ever cross an international border. There is no justification for any border patrol or customs interdiction on Interstate 10 with unfettered international border crossing search authority. Cf. Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979) (rejecting a theory of "intermediate borders" analogous to international borders).

As recognized by the Fifth Circuit in United States v. Luddington, 589 F.2d 236

(5th Cir.), cert. den., 441 U.S. 936, 99 S.Ct. 2061, 60 L.Ed.2d 666, and cert. den., 442 U.S. 910, 99 S.Ct. 2824, 61 L.Ed.2d 276 (1979), there is no dispute about the significant effect on domestic traffic created by the Sierra Blanca Border Patrol checkpoint. 589 F.2d at 241.

> Interstate 10 is one of the major arteries of the interstate highway system, stretching coast to coast from Los Angeles to Jacksonville, Florida. Interstate 10 is a route of preference for truckers, bus drivers, and other travelers because it is snow- and ice-free virtually the year round. (Id.).

Regardless of the volume of traffic along Interstate 10 from Los Angeles to Jacksonville, or more particularly from El Paso to San Antonio, the Sierra Blanca checkpoint is no more the functional equivalent of an international border than is the Interstate 10 checkpoint west of Las Cruces, New Mexico, or the San

Clemente checkpoint located on Interstate 5 between San Diego and Los Angeles, or the Florida City checkpoint on U.S. 1.

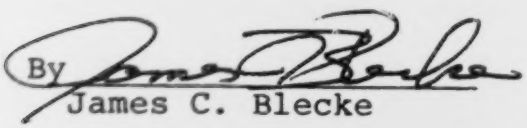
As long as the Fifth Circuit treated Sierra Blanca functional equivalency in the context of an 8 U.S.C. §1357 warrantless search for aliens, the Fourth Amendment sustained no irreparable harm. But with its opinion in Oyarzun, and this decision bottomed upon Oyarzun, the Fifth Circuit has stretched functional equivalency to the breaking point and beyond, requiring intervention by this Court.

## CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

James C. Blecke
Counsel of Record

By 
James C. Blecke

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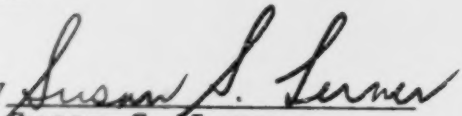
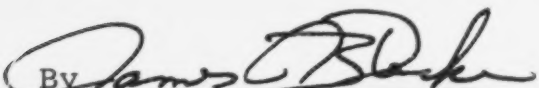
By 
Susan S. Lerner
Attorneys for
Petitioner
705 Biscayne Bldg.
19 W. Flagler St.
Miami, Florida 33130
(305) 358-5999

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari and the following appendix were mailed, postage prepaid, pursuant to Supreme Court Rules 28.3 and 28.4 to the Solicitor General, Department of Justice, Washington, D.C. 20530; WILLIAM J. LANDERS, Special Counsel, U.S. Department of Justice, 10th and Constitution Avenue, Northwest, Washington, D.C. 20530; and JORGE A. SIBILA, ESQ., 2751 Coral Way, Miami, Florida 33145, this 21st day of March, 1986.

James C. Blecke
705 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

By 
James C. Blecke

# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA

V. No. P-84-CA-48

$127,000 IN UNITED
STATES CURRENCY

MEMORANDUM OPINION

The United States of America seeks the judicial forfeiture of $127,000.00 in United States currency pursuant to 21 U.S.C. § 881(a)(6). The government contends that such funds are forfeitable as proceeds either traceable to the illicit exchange of controlled substances within the meaning of 21 U.S.C. § § 841, 881, or that such funds were intended to facilitate such an exchange.

In compliance with Rule 52(a), Federal Rules of Civil Procedure, this Court, after fully considering the pleadings filed herein, reviewing the evidence pre-

sented at a bench trial held on December 17, 1984, and the controlling legal authorities, enters the following Findings of Fact and Conclusions of Law. In this cause, any Finding may be construed as if written as a Conclusion and vice versa.

## FINDINGS OF FACT

1. On or about September 6, 1984, Herlindo Rubio attempted to cross through the Sierra Blanca Permanent Border Patrol Checkpoint on Interstate 10, approximately 80 miles east of El Paso, Texas. When questioned by the border patrol agent then on duty at the primary inspection point, Agent Acosta, as to his national citizenship and status within this country, Rubio stated that he was a Cuban and immediately produced a legal resident alien card and valid driver's license establishing his legal status within the United States.

2. Acosta instructed Rubio to park his vehicle at the secondary inspection station where he once again produced his legal resident alien card and valid driver's license to Agent Mark Fogt, who was standing near the trunk of the vehicle.

3. Agent Acosta did not testify. Fogt testified that although he was approximately eight feet away, on the side of an interstate highway, he overheard the conversation between Acosta and Rubio. Fogt testified that Rubio appeared to be somewhat nervous.

4. Fogt ordered Rubio to open the trunk of the vehicle. Once inside the trunk Fogt found a small red personal travel suitcase which he opened and searched. Inside the suitcase, Fogt found a locked commercial bank bag which he searched and found approximately $25,000.00 in United States currency. Additionally, Fogt found a combination-locked metal toolbox,

which he ordered Rubio to open. Upon being informed by Rubio that he did not know the combination to the lock, Fogt broke the lock, searched the box and found additional United States currency. Continuing his search of the vehicle and its contents, Fogt found a small electric portable refrigerator in the trunk. Inside the refrigerator, Fogt found another commercial bank bag containing, not surprisingly, "cold cash." Also produced in the search of the trunk was a small vinyl case which was opened and found to contain a triple beam (balance) scale with white residue thereon.

5. The entire search of the interior and trunk of the vehicle was based solely upon what Fogt perceied to be nervousness on the part of Rubio.

6. There was no contraband found within the passenger compartment of the vehicle, nor was there found anything therein

which might suggest the possibility of the existence of contraband. Likewise, a visual inspection of the interior of the vehicle's trunk suggested nothing which might hint at the possibility of illegal activity.

7. Fogt testified that the "mission" of the United States Border Patrol at the Sierra Blanca Checkpoint was to "apprehend illegals." It became immediately apparent to the Border Patrol that no illegal aliens were contained within Rubio's vehicle.

8. After rummaging through Rubio's personal effects, Fogt arrested Rubio and escorted him into the Border Patrol trailer where Acosta read him his Miranda rights.

9. Inside the trailer, Rubio was physically searched and a 3" X 5" notebook which contained some writing was found on his person. Upon being questioned in

regard to the notebook, Rubio stated that he had found the notebook on the ground and did not have knowledge of the content or meaning of the writing therein. Upon being questioned as to how he came about such large amount of currency, Rubio testified that he claimed the currency to be proceeds of an auspicious trip to Las Vegas, Nevada. The Court finds Rubio's testimony in this regard to be incredible and it shall be disregarded. But for the illegal search, the Court is convinced that the currency is forfeitable under the provisions of 21 U.S.C. § 881(a)(6).

10. The search was not conducted pursuant to consent and Rubio has standing to challenge its validity.

11. After the arrest, Fogt contacted Eino Hella, a fifteen year veteran of the Drug Enforcement Administration ("DEA") in Alpine, Texas, and requested that he

come to the checkpoint to further investigate and interrogate Rubio.

12. Hella opined that the currency in question was traceable to an exchange as contemplated by 21 U.S.C. § 881(a)(6) because:

> (a) a large amount of money was found predominantly in commercial bank bags and a smaller portion was found wrapped in aluminum foil;
>
> (b) the presence of the notebook containing figures;
>
> (c) the fact that Rubio was travelling east on U.S. Interstate Highway 10 and that drugs usually came from Florida to California and drug money is usually brought back to Florida;
>
> (d) the fact that Rubio was a resident of Florida;
>
> (e) the fact that traces of cocaine were found on the scales which claimed to have been found in Rubio's vehicle.

13. Rubio testified that the scales were found in his son's vehicle. Because of the Court's disposition of the search and seizure issue, however, the issue of

"where" the scales were found need not be reached. The scale, if in fact found in Rubio's vehicle, was, like the currency, the product of an illegal search.

14. Rubio has been released; no criminal charges are currently pending against him.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction over this 21 U.S.C. § 881 forfeiture proceeding pursuant to 28 U.S.C. §§ 1345, 1355.

2. The exclusionary rule of the fourth amendment applies in forfeiture proceedings and probable cause for forfeiture cannot rest upon tainted evidence. United States v. $64,000 in United States Currency, 722 F.2d 239, 243 (5th Cir. 1984), citing United States v. One Mercury Cougar XR-7, 666 F.2d 228, 230 (5th Cir. 1982).

3. The stop of Rubio's vehicle at the Sierra Blanca Permanent Checkpoint was a valid stop. United States v. Dreyfus de Campos, 698 F.2d 236 (5th Cir. 1979).

4. The visual inspection of the trunk was valid. In the absence of probable cause, however, the search of Rubio's vehicle was limited in scope to large areas in which an illegal alien could reasonably be believed to be concealed. United States v. Alvarez Gonzalez, 561 F.2d 620, 621 (5th Cir. 1977); see also United States v. Whitmire, 595 F.2d 1303, 1315 n. 32 (5th Cir. 1979); United States v. Robinson, 567 F.2d 637 (5th Cir. 1978).

5. Fogt testified that he conducted the full-blown search of Rubio's vehicle and its contents based solely upon what he perceived to be nervousness. The Court is of the opinion that this fact, without more, was insufficient to establish prob-

able cause to search the entire vehicle and its contents.

6. It is unreasonable to believe that aliens could have been concealed in the containers which Fogt searched. Fogt testified that perhaps a "small alien" could be hiding in some of the containers; the Court disregards such as absurd.

7. In the context of 21 U.S.C. § 881, probable cause means "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than a mere suspicion." United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1305 (5th Cir. 1983); United States v. One 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 727 (5th Cir. 1982); Vance v. United States, 676 F.2d 183, 187 n.7 (5th Cir. 1982); United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980); see also United States v. One 1979

Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983).

8. From the sheer quantity of currency seized, a court may permissibly infer a connection with illegal narcotics trafficking. United States v. $364,960 in United States Currency, 661 F.2d 431, 437 (2d Cir. 1976), cert. denied, 428 U.S. 1091 (1977); United States v. Tramunti, 513 F.2d 1087, 1105 (2d Cir. 1975), cert. den., 419 U.S. 1079 (1976).

9. While the government has established probable cause that a substantial connection existed between the currency and criminal activities proscribed by federal law, the Court considers the search of the containers found in the vehicle's trunk to be outside the scope of that permissible by law.

10. There is fundamental difference in purpose and function between the United States Customs Service and the United

States Border Patrol. Contrary to what some believe, Border Patrol agents simply do not possess the same authority to search as do customs officers. The function of a customs officer is to "protect the revenue and to provide for the admission of foreign merchandise into customs territori[ies]." 19 U.S.C. § 81d. This function justfies the more expansive nature of the instruction upon one's liberty while crossing an international border. Conversely, the role of border patrol agent is to "[patrol] the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. § 1357(a)(3).

CONCLUSION

The Court is of the opinion that the government has shown that the Attorney General of the United States has probable cause to believe that the currency in

question had been furnished or was intended to be furnished in exchange for prohibited drugs, or that these funds were traceable to such an illicit exchange.

It cannot be said, however, that Agent Fogt was furthering his stated mission of "apprehending illegals" while rummaging through Rubio's personal effects. Because Fogt exceeded the scope of a search necessary to effectuate his purpose, and thereby violating Rubio's fourth amendment rights, the Court shall provide in its Judgment that the government take nothing.

SIGNED and ENTERED this the 31st day of December, 1984.

s/
LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA

V. No P-84-CA-48

$127,000.00 IN UNITED
STATES CURRENCY

JUDGMENT

In accordance with the Memorandum Opinion entered on this date, the Court enters its Judgment in the above-captioned cause as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the United States of America take nothing by its claims.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the United States of America release and return said sum of $127,000.00 to its rightful owner, Helindo Rubio.

Costs are hereby assessed against the United States of America.

SIGNED and ENTERED this 31st day of December, 1984.

s/
LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 85-1146
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff, Appellant,

versus

$127,700.00 in UNITED STATES CURRENCY,

Defendant,

HERLINDO RUBIO,

Claimant-Appellee

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Appeal from the United States
District Court for the
Western District of Texas

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( December 23, 1985 )

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

JOHNSON, Circuit Judge*:

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-

The United States Government filed suit under 21 U.S.C. § 881(a)(6)[1] to obtain the forfeiture of $127,700 in

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settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

1. 21 U.S.C. § 881(a)(6) provides that:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

United States currency seized by border patrol agents during a search for contraband. The Government appeals from the district court's judgment denying forfeiture on the ground that the currency was seized in violation of the Fourth Amendment. Concluding that no Fourth Amendment violation occurred, this Court reverses the judgment of the district court.

## I. BACKGROUND

Herlindo Rubio, a resident alien, was stopped by United States Border Patrol agents at the Sierra Blanca border patrol checkpoint, located on Interstate 10, eighty miles east of El Paso, Texas. Rubio was instructed to pull off the road into a secondary inspection area. After observing that Rubio appeared to be somewhat nervous, a border patrol agent ordered Rubio to open the trunk of Rubio's car. The agent, without probable cause,

searched a red vinyl suitcase, a tool box, and a small portable electric refrigerator, all located inside the trunk. The search uncovered a triple beam balance scale containing traces of cocaine and $127,700 in United States currency.

After seizing the currency, the Government filed a complaint for forfeiture pursuant ot 21 U.S.C. § 881(a)(6), seeking ownership of the currency discovered in Rubio's car. Rubio asserted as an affirmative defense that the search was conducted in violation of the Fourth Amendment thus requiring the Government to return the seized currency.[2] The district court found that the border

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2. The exclusionary rule of the Fourth Amendment applies in forfeiture proceedings and probable cause for forfeiture cannot rest upon tainted evidence. United States v. $64,000 in United States Currency, 722 F.2d 239, 243 (5th Cir. 1984) (citing United States v. One 1979 Mercury Cougar XR-7, 666 F.2d 228, 230 (5th Cir. 1982)).

patrol agents lacked probable cause to search Rubio's car for contraband, that an illegal alien could not have hidden in the containers searched,[3] and that the search was therefore unlawful. Based on these conclusions, the district court entered judgment in favor of Rubio and ordered the Government to return the $127,700 in seized currency to Rubio. The Government appeals from the district court's judgment.

II. DISCUSSION

In **United States v. Oyarzun**, 760 F.2d 570 (5th Cir. 1985), decided by this

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3. The district court reasoned that the function of a border patrol agent differs from that of a customs officer. According to the district court, nonprobable cause searches conducted by border patrol agents at the functional equivalent of a border are limited to searches for aliens.

Court several months after the judgment of the district court in the instant case, we held that "nonprobable cause searches for contraband at the Sierra Blanca checkpoint are valid border searches because of the checkpoint's legal status as the functional equivalent of the border." Id. at 576 (emphasis added). This Court in **Oyarzun** expressly rejected the contention that nonprobable cause searches conducted at Sierra Blanca are limited to those large areas of a vehicle in which aliens could be hidden.

Rubio contends that the rule announced in **Oyarzun** applies only where the search is conducted by customs officers rather than border patrol agents. Rubio argues that because the function of a border patrol agent is limited to preventing the illegal entry of aliens into the United States, nonprobable cause searches

conducted by border patrol agents must be limited to searches for aliens.[4] However, this Court has observed "that Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer." **United States v. McDaniel**, 463 F.2d 129, 134 (5th Cir. 1972), cert. denied, 413 U.S. 919, 93 S. Ct. 3046, 37 L. Ed. 2d 1041 (1973). Border patrol agents, at the border or its functional equivalent, can don "their customs hats during a proper border search." Id. Furthermore, border patrol agents, not customs officers, conducted the search approved by this Court in **Oyarzun**. Thus, Rubio's attempt to distinguish the authorized scope of a border search conducted by a customs officer

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4. According to Rubio, customs agents, in contrast, may conduct nonprobable cause border searches for contraband because of the broader function served by customs agents.

from that of a search conducted by a border patrol agent is without merit.

Rubio also contends that because the border patrol agents in the instant case lacked probable cause to search Rubio's car for contraband, **Oyarzun** does not apply. This contention is without merit. Contrary to Rubio's contention, **Oyarzun** expressly held that probable cause was not required to conduct a search for contraband at the Sierra Blanca checkpoint. Moreover, the agents in **Oyarzun** itself did not have probable cause to search for contraband.

Finding the instant case controlled by our recent decision in **Oyarzun**, this court reverses the judgment of the district court.

REVERSED AND REMANDED

(2)

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1560

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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HERLINDO RUBIO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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NPP

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 85-1560

HERLINDO RUBIO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner contends that currency discovered during a search of his automobile at a permanent Border Patrol checkpoint long recognized as the "functional equivalent of the border" should have been suppressed because the officer who conducted the search acted without probable cause.

1. The evidence adduced at trial showed the following (Pet. App. A2-A8). On September 6, 1984, petitioner was stopped at the Sierra Blanca checkpoint, a permanent Border Patrol checkpoint located on Interstate Highway 10 near the international border between the United States and Mexico.[1] The officer at the primary inspection station questioned petitioner about his citizenship. Petitioner stated

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[1]The location and operation of the checkpoint is described in *United States* v. *Hart*, 506 F.2d 887, 896-897 (5th Cir.), vacated and remanded, 422 U.S. 1053 (1975), reaff'd on remand, 525 F.2d 1199 (5th Cir.), cert. denied, 428 U.S. 923 (1976).

that he was Cuban and produced a resident alien registration card and a driver's license. Petitioner then was directed to a secondary inspection station, where he again produced his resident alien card and his driver's license. *Id.* at A2-A3, A18.

One of the Border Patrol officers observed that petitioner appeared to be nervous, and he therefore directed petitioner to open the trunk of the car. Inside the trunk was a small suitcase, which the officer opened and found to contain a locked commercial bank bag. The officer discovered $25,000 in currency inside the bag. Additional large amounts of currency were concealed inside a small metal toolbox that was closed with a combination lock, as well as inside a small portable electric refrigerator. The officer also discovered a vinyl case containing a balance scale; the scale was coated with a white residue that later was found to be cocaine. Pet. App. A3-A7, A18-A19.

2. The government filed a complaint in the United States District Court for the Western District of Texas seeking civil forfeiture of the $127,700 in currency discovered in the trunk of petitioner's automobile. The complaint alleged that the money was subject to forfeiture pursuant to 21 U.S.C. 881(a)(6), because it either had been furnished or was intended to be furnished in exchange for illegal narcotics. The district court denied the forfeiture complaint on the ground that the search of the containers in the trunk of petitioner's car violated the Fourth Amendment (Pet. App. A1-A15). The court found that the government had "established probable cause that a substantial connection existed between the currency and criminal activities proscribed by federal law," but that "the search of the containers found in the vehicle's trunk [was] outside the scope of that permissible by law" (*id.* at A11).

The search was unlawful, the court concluded, because—in the absence of a showing of probable cause—the Fourth Amendment limited the scope of "the search of [petitioner's] vehicle * * * to large areas in which an illegal alien could reasonably be believed to be concealed" (Pet. App. A9). The court found that the Border Patrol officer could not reasonably have believed that the containers concealed illegal aliens, and that the search was not otherwise justified by probable cause (*id.* at A9-A10). The court also stated that "Border Patrol agents simply do not possess the same authority to search as do customs officers" (*id.* at A12). The court therefore ordered the government to return the seized currency to petitioner (*id.* at A14).

3. The court of appeals reversed the district court's judgment in an unpublished opinion (Pet. App. A16-A23). The court of appeals observed that after the district court had issued its decision in the present case, a panel of the Fifth Circuit issued the decision in *United States* v. *Oyarzun*, 760 F.2d 570 (5th Cir. 1985). *Oyarzun* held that "nonprobable cause searches for contraband at [the] Sierra Blanca [checkpoint] are valid border searches because of that checkpoint's legal status as the functional equivalent of the border" (760 F.2d at 576). The court below stated that *Oyarzun* "expressly rejected the contention that nonprobable cause searches conducted at Sierra Blanca are limited to those large areas of a vehicle in which aliens could be hidden" (Pet. App. A21). It concluded that *Oyarzun* established the validity of the search conducted in the present case.

The court of appeals also rejected petitioner's contention that the search in this case was invalid on the ground that Border Patrol agents may conduct a search only if the search is designed to apprehend illegal aliens. It noted that Border Patrol agents " 'wear two hats, one as an immigration officer and the other as a customs officer' " (Pet. App.

A22 (citation omitted)), and concluded that the Border Patrol officer's search for contraband in this case was completely proper (*id.* at A22-A23).

4. The unanimous decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

It is settled that "[r]outine searches of the persons and effects of [travelers entering the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *United States* v. *Montoya de Hernandez*, No. 84-755 (July 1, 1985), slip op. 6 (footnote omitted); see also *United States* v. *Ramsey*, 431 U.S. 606, 616, 619 (1977); *Carroll* v. *United States*, 267 U.S. 132, 154 (1925). These routine border searches "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973)).

The Fifth Circuit consistently has held that the site of the search of petitioner's automobile—the Sierra Blanca checkpoint—is the "functional equivalent of the border." *United States* v. *Oyarzun*, 760 F.2d 570, 574-576 (5th Cir. 1985); *United States* v. *Dreyfus-de Campos*, 698 F.2d 227, 229 (5th Cir.), cert. denied, 461 U.S. 947 (1983); *United States* v. *Luddington*, 589 F.2d 236, 240-241 (5th Cir.), cert. denied, 441 U.S. 936 (1979); *United States* v. *Hart*, 506 F.2d 887, 896-897 (5th Cir.), vacated and remanded, 422 U.S. 1053 (1975), reaff'd on remand, 525 F.2d 1199 (5th Cir.), cert. denied, 428 U.S. 923 (1976). The court has cited, among other factors, the extremely close proximity of

Interstate 10—the road on which the checkpoint is located—to the border with Mexico, and "the ease with which persons in Mexico could cross the Rio Grande River and reach the vicinity of Sierra Blanca without passing through any other inspection station." *United States* v. *Oyarzun*, 760 F.2d at 575; see also *United States* v. *Luddington*, 589 F.2d at 240 ("Interstate 10 roughly parallels the [Rio Grande River] at a distance of 2 to 5 miles along the entire stretch from El Paso to the checkpoint"); *United States* v. *Hart*, 506 F.2d at 896.

Since the Sierra Blanca checkpoint constitutes the functional equivalent of the border, government agents may search automobiles stopped at the checkpoint without a showing of probable cause. *Almeida-Sanchez* v. *United States*, 413 U.S. at 272-273; *United States* v. *Oyarzun*, 760 F.2d at 574-576; *United States* v. *Dreyfus-de Campos*, 698 F.2d at 229. The court of appeals therefore correctly concluded that the search of petitioner's car constituted a border search that was permissible under the Fourth Amendment (Pet. App. A20-A23).

Petitioner's challenge to the decision below is based upon legal principles that simply are not relevant here. Petitioner notes (Pet. 11-17) that in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the Court concluded that the government's interest in controlling the influx of illegal aliens justified a rule permitting law enforcement officers operating at a fixed checkpoint within the United States to stop a vehicle and inquire as to the citizenship of the occupants without any individualized suspicion as to the occupants of the car (428 U.S. at 560-564). In *United States* v. *Ortiz*, 422 U.S. 891 (1975), on the other hand, the Court had concluded that "at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." 422 U.S.

at 896-897 (footnote omitted); see also *Martinez-Fuerte*, 428 U.S. at 558, 567.

Petitioner has confused the standard governing searches at checkpoints within the United States with the entirely different standard that applies to searches at the border and its functional equivalents. *Ortiz* makes clear that, while searches upon less than probable cause may not be conducted at a checkpoint located away from the border, the same rule does not apply to a search at the functional equivalent of the border, such as the search at issue in this case. In the latter context, the Fourth Amendment permits searches without probable cause. Thus, petitioner's entire argument rests upon his fact-bound contention that the Sierra Blanca checkpoint is not the functional equivalent of the border.[2]

As a threshold matter, this question is not properly before the Court because petitioner did not previously challenge the status of the Sierra Blanca checkpoint as the functional equivalent of the border. Since the issue was not raised in the court below, it may not now be raised in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).[3]

Moreover, petitioner has presented no facts in support of his challenge to the court of appeals' characterization of the checkpoint. He states (Pet. 33-34) that Interstate 10 does

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[2]The decisions of the courts of appeals cited by petitioner (Pet. 17-20) all relate to checkpoints that were not found to be the functional equivalent of the border.

[3]Petitioner failed to seek rehearing in the court of appeals, even though the Fifth Circuit pointed out in *Oyarzun* that the status of the Sierra Blanca checkpoint was an issue appropriate for review by the en banc court (see 760 F.2d at 576-577).

not cross the international border and that some domestic traffic travels along this route. But these assertions do not undercut the validity of the Fifth Circuit's thorough, repeated analyses of this issue, all of which have reached the conclusion that the Sierra Blanca checkpoint constitutes the functional equivalent of the border (see pages 4-5, *supra*).[4] The search of petitioner's automobile therefore was a border search permissible under the Fourth Amendment without a showing of probable cause.[5]

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[4]Petitioner erroneously asserts (Pet. 23-24) that *United States* v. *Garcia*, 672 F.2d 1349 (11th Cir. 1982), conflicts with these Fifth Circuit decisions. But the search at issue in *Garcia* was upheld as an "extended border search"; the court concluded that the site of the search was not the functional equivalent of the border because it was "neither * * * the place of first landing within the country, nor * * * the first practicable detention point" (672 F.2d at 1366). The court acknowledged that a search may be categorized as a search at the "functional equivalent of the border" if "there is [a] reasonable certainty that the object or person searched has just crossed the border, there has been no time or opportunity for the object to have changed materially since the time of the crossing, and the search is conducted at the earliest practicable point after the border was crossed" (*id.* at 1363-1364). There is little difference between this test and the factors cited by the Fifth Circuit in concluding that the Sierra Blanca checkpoint constitutes the functional equivalent of the border.

[5]Petitioner also contends (Pet. 29-33) that the Border Patrol officers were not authorized to conduct the Customs search in this case because the relevant statute requires that the search be justified by "reasonable cause." First, it is noteworthy that petitioner does not defend the district court's erroneous conclusion (Pet. App. A11-A12) that Border Patrol officers may not conduct Customs searches at the border. The courts of appeals have recognized that Border Patrol officers may conduct border searches authorized by the Customs statutes. *United States* v. *Whiting*, 781 F.2d 692, 696 (9th Cir. 1986); *United States* v. *McDaniel*, 463 F.2d 129, 134 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973).

Second, petitioner's claim is incorrect; the statutes authorizing Customs searches do not all require reasonable cause in order to justify a border search. See 19 U.S.C. 1582 ("all persons coming into the United States from foreign countries shall be liable to detention and search"); see also *United States* v. *Montoya de Hernandez*, slip op. 6, 7-8; *United States* v. *Ramsey*, 431 U.S. at 611-615.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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